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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 334

ROBERT BOENKER,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed with a Memorandum to Lawyers in their case No. 28748. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right for the reason that no substantial constitutional question exists in this case.

The Ohio courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

QUESTIONS PRESENTED.

The "Questions Presented" in the petition do not accurately present questions raised by the record and by the opinion and judgment of the Court of Appeals. Respondent submits that the subject matter of petitioner's questions would be more properly stated as follows:

I. In the circumstances of this case, was the statement written out by the petitioner in answer to a general inquiry by the police officer at the scene of a traffic accident as to what happened obtained in violation of the constitutional rights guaranteed by the Fifth Amendment to the United States Constitution?

II. Was the trial court's charge on the Ohio assured clear distance rule violative of the petitioner's right to be informed of the nature and cause of the accusation as guaranteed by the Sixth Amendment of the United States Constitution?

STATEMENT OF THE CASE.

Robert E. Boenker was indicted for manslaughter in a second degree (traffic manslaughter) under Ohio Revised Code Section 4511.18 which provides:

> "No person shall unlawfully and unintentionally kill another while violating any law of this state applying to the use or regulation of traffic, Any person violating this section is guilty of manslaughter in the second degree."

The indictment specified that the defendant violated Ohio Revised Code Section 4511.21 which provides:

> "No person shall operate a motor vehicle, trackless trolley, or streetcar in and upon the streets and highways at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface, and

width of the street or highway and any other conditions, and no person shall drive any motor vehicle, trackless trolley, or streetcar in and upon any street or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead."

State's Evidence.

At the commencement of the trial it was stipulated that the victim, John Papp, age 6, died as the result of an automobile-pedestrian accident at Magee and Madison Avenue, in Lakewood, Ohio, at 6:30 p.m. February 18, 1966. The automobile that struck John Papp was a 1963 Chevrolet convertible, driven by the defendant, Robert Boenker.

At the point of the accident Magee Avenue extends south from Madison Avenue, which is 44 feet wide at this point. Almost directly across Madison from the westerly curb of Magee is the easterly curb of Winchester Avenue, which extends north from Madison. About one block west Lark Avenue runs into Madison and there is a traffic light at this intersection. This section of Madison Avenue is a business area. At the time in question there were traffic signs posted showing a 25 miles-per-hour speed limit for vehicles on Madison. The center line of Madison was indicated by a crack in the paving. There was a manhole cover on Madison, just north of the center, almost opposite the east curb of Magee.

On the evening of February 18, 1966 at 6:30 the streets were dry. It was a clear night at about dusk. The street lights were turned on, one light being on the northeast corner of Winchester. There were lighted stores along Madison in the area of the intersection, one being at the corner of Madison and Winchester.

The Potomic family, consisting of the parents, son Dennis, 22, and a daughter, 19, had crossed Madison from the northeast corner of Winchester to their car parked on the south side of Madison just west of the southwest corner of Magee. As Dennis turned right to go to his car he noticed a little boy to his left standing in the street about four or five feet off the curb. Dennis testified:

> "A. When I noticed his jerky movements as if to go across the street, I turned and walked over to him and asked him if he wanted to cross the street, if he was going to cross the street and he said yes and I extended my arm to reach down towards him.
>
> * * *
>
> A. Yes; he took my hand with his left hand and reached up.
>
> * * *
>
> A. Since I had just completed crossing the street from the opposite direction, there was no traffic at that time. There still was no traffic as I turned around to the little boy."

Dennis remembered that there were no oncoming cars in the block between Magee Avenue and Lark to the west where the traffic light was. After he looked to see if there was any traffic, the following occurred (R. 104-105):

> "I proceeded to cross the street with the little boy, and as I approached the middle of the street looking still both ways, I noticed a car coming from the east, so I walked to the center of the street, tried to position myself on the center of the street. I reached the center of the street and there still was no traffic coming from the west area within that block. As I reached the center of the street, we stopped and I concentrated my eyes on the traffic coming from the east."

Dennis saw only one car coming from the east and stopped dead in his tracks. The car was coming at what

he thought was a normal rate of speed. He waited about five seconds for that car to get by. He was positioned in the direct center of the street. The little boy was on his right or east side. Asked what happened then, he said (R. 106):

> "I don't remember the car that struck me. All I remember is watching the car that came from the east, being that that was the car I had to get by in order to complete crossing the street, and I don't remember anything else."

Dennis was taken to Lakewood Hospital. He remained there 33 days.

Dennis Potonic's father, who was standing in the street about two steps from the curb, watched his son stop, talk to the little boy, take the boy's hand, walk to the center of Madison and stop there waiting for the westbound traffic to clear. Mr. Potonic then turned to walk to his car. He saw lights of a car facing east near the traffic light at Lark, one block west of where his son Dennis was standing. The lights seemed to be pointed higher than he thought they should. There was no other traffic between the place where his son and the little boy were standing and the traffic light at Lark. After he had taken perhaps three steps he heard a thud. He looked for his son and found him lying back of a Volkswagen that was facing west, about the length of the Volkswagen from where he had been standing. Looking up the street Mr. Potonic saw what looked like a jacket or coat lying in the street, about four car lengths farther east. He saw a pair of little sneakers where his son was. There was a car stopped east of where the little boy was lying. The police arrived in two or three minutes.

The driver of the westbound Volkswagen was Paul Landolfo, a teacher, who lived on Madison Avenue and

was on his way home at the time. He was approximately at the intersection one block east of Winchester when he first saw the pedestrians standing in the center of Madison. There was no eastbound traffic between him and the Lark Avenue traffic light, which was red. He described what happened then (R. 211-212):

> "I saw them standing there, and as I approached, as I came within the block towards them, I noticed that the one boy was a small boy I began to slow down. I don't know why, except I thought maybe the young boy might dart out in front of the car or something, but I began to slow down which left, by the time I got to the scene of the accident, quite a big space between myself and the cars which were ahead of me which had already begun to speed up because the light had changed green, and as I approached * * *"
>
> * * *
>
> "The cars ahead of me began to speed up and I slowed down. I don't think I was going more than 15, possibly 10 or 15."

As Mr. Landolfo approached the pedestrians he saw an eastbound car which was over too far at the center of the street. The car seemed to be accelerating. The headlights were tilted up as happens when a car accelerates. Mr. Landolfo saw where the pedestrians were standing and the way the car was coming and he knew if the car continued in this path it would hit the pedestrians. He described what happened as the car proceeded east (R. 213-214):

> "It hit the pedestrians who were standing in the middle of the street.
>
> "At this time, I was almost upon them, being almost right next to them, and the older boy then was thrown diagonally into the front of my car, not

actually the front itself, actually, in the side, more the side than the front, and the younger boy I didn't see until after I had gone and called the police."

* * *

"Well, I would say the tire of the car was just probably on it (centerline) or very close to it, leaving the bumper and so forth hanging over that line."

Mr. Landolfo called the police. When he got out of his car he saw the older boy lying approximately two feet behind his car. While he was standing in the street waiting for the police he saw what looked like a pile of clothes in the road about 80 feet to the east in the east lane close to the center. He saw the car that hit the pedestrians stopped down the road. It was a 1963 Chevrolet convertible. Mr. Landolfo described the weather condition as very good, almost like a summer night except it was just chilly. The streets were dry, and clear.

The 1963 Chevrolet convertible in question was observed by Mrs. Linda Alberino, who was driving east on Madison after picking up a passenger, about two miles farther west. Mrs. Alberino first noticed the 1963 Chevrolet proceeding east at the traffic light at Bunts Road and Madison Avenue. She noticed also that each time after both cars were stopped for a red light and started up again the Chevrolet car the defendant was driving was soon almost a block ahead of her, although she was driving at the 25-mile limit posted on the signs. Both cars stopped for the light at Madison and Lark, the defendant's car ahead of Mrs. Alberino. When they started up, she had not reached the middle of the block by the time he had reached Magee. When she reached Magee she saw there had been an accident. The Chevrolet was farther east on Madison in the center of the right-hand lane. She saw a body behind the Chevrolet and another body lying in the center of Madison by a Volkswagen.

The Lakewood police officer dispatched to the scene at 6:37 p.m. was John L. Javor, whose assignment was accident investigator. When he arrived he saw two bodies lying in the street in these locations (R. 257):

> "The older pedestrian, Potonic, Potonic's body was lying at the intersection of Magee and Madison. His body was 1 foot north of the manhole cover, and at at the time I noticed a Volkswagen had been stopped approximately 8 feet west of the body and then I also noticed a body lying in the center of the center line approximately 84 feet east of this manhole cover, and I also noticed a 1963 Chevrolet convertible, maroon color, that was east of this body lying in the center of the street, and this car, the rear of this car, was stopped 108 feet east of the manhole cover."

Robert Boenker, the defendant, told the officer he was the driver of the car that was stopped east of the manhole cover, stating (R. 259):

> "Well, at the time he stated that he was the driver of the Chevrolet, he also stated that he was near the center line going east on Madison, about 35 miles an hour, and he also, when he approached Magee, about 2 car lengths away he noticed a 1957 blue Oldsmobile that made a half turn into Magee and back into Madison. His eyes were turned towards that car that made that half turn and then he heard a thud and glass breaking and something flying off to his left, and when he stopped the car, he was 108 feet east of the manhole cover."

Ten or fifteen minutes later, after assisting the ambulance and inquiring if anyone saw the accident, the officer talked to Boenker again, outside the police cruiser and asked Boenker if he cared to write down what he had said. Boenker agreed and sat in the cruiser while he wrote out and signed a statement (St. Ex. 2) (R. 265-266). Mr. Landolfo was in the cruiser at the same time writing out

a statement. After Boenker wrote out the statement the officer told him he was free to go and Boenker left.

The spot where the small boy's body was lying on the center line of Madison was 84 feet from the edge of the manhole cover, which was 8 feet east of the Volkswagen. The Chevrolet was stopped 108 feet from the manhole cover. The left front headlight of the Chevrolet was damaged. The officer found a piece of cloth about two or three inches long embedded in the chrome strip of the headlight area. The officer looked for skid marks, because if he was going 35 miles an hour and came to a stop, as he said, he should have applied his brakes. The officer did not find any skid marks. He described the area as a business district with stores and banks on Madison. A traffic sign for 25 miles per hour is posted for eastbound traffic approximately one-tenth of a mile west of where the accident took place.

Defense Evidence.

The petitioner, who worked in the supermarket operated by his parents several blocks from the scene of the accident, said he was on his way to the store from his home in Rocky River (west of Lakewood) to pick up some groceries. His account of the accident was that after he passed the light at Lark Avenue and Madison a car in front of him made a turn into Magee Avenue and then turned back out again onto Madison. The petitioner heard a thump and glass breaking. He did not slam on his brakes but stopped normally in the eastbound traffic lane opposite the point where the next street east runs into Madison. He said he was looking at the car that had turned out in front of his when he heard the thump. Looking in the mirror he saw a body lying in the street and ran back then called the police from a real estate office.

When the police arrived the petitioner said he told officer Javor he was the driver of the car. He was asked for his driver's license and gave it to the officer, who retained it. When the officer asked him what happened the petitioner told him about the car in front of him. He told the officer he was going 35 miles an hour because he "had heard other people say it." He did not know how fast he was going. He told the officer that when he heard the thump he thought his car and another car had sideswiped, after which the officer asked him to wait in the cruiser so he wouldn't get hit. "Traffic was starting up again and it was starting to go through the intersection and I was standing on the street." He did not wait in the cruiser long prior to writing out the statement.

The petitioner said that after he started writing the statement, he asked the officer if he could call his parents. The officer said it was important to get the statement down, get the facts while "they're still fresh in my mind." When questioned as to why he crossed out certain words, the petitioner said the officer told him to "be specific. He wanted to get every fact in there." (R. 393)

The petitioner was questioned by his counsel concerning the contents of the statement. He said that the statements, "I was watching the car that pulled out of Magee and I didn't see the people in the street." "The reason I stopped was because I heard the thump of the people off of my car." "And I realized that I had hit someone," were not correct; he stopped because he thought he sideswiped another car. He said he first realized that he hit someone after he looked back in his rear view mirror.

On cross-examination the petitioner admitted he was familiar with the posted speed in the area; there were signs posted on Madison Avenue saying 25 miles per hour.

He admitted having told the police he was going 35 miles an hour. The police officer did not tell him to say that, but he mentioned that figure because someone else had given him that idea. He really didn't know how fast he was going. He said there was no car ahead of him when he was waiting for the light at Lark and Madison. He saw the car he said was up ahead when he started up. He did not see anything in the middle of the street. He wasn't looking directly in the middle of the street. (R. 409) He didn't see what he hit because he wasn't looking at that point when he hit something. He didn't see the pedestrians at all.

LAW AND ARGUMENT.

1. The State's evidence in this case includes testimony by the officer at the scene as to what the petitioner said when the officer asked him what had happened and the statement (St. Ex. 2) the petitioner wrote out in the police cruiser a few moments afterwards. Before trial commenced the court conducted a hearing on a motion to suppress all oral or written statements by the petitioner to the police. At the conclusion of the hearing and arguments of counsel the court overruled the motion as to the oral and written statements made at the scene, stating (R. 63-64):

> "The Court: Let me say on behalf of the Lakewood police, there is no question in my mind this statement was voluntary, at least in the mind of the court, and certainly under the law as it was known to the police at the time of the accident, the statement was admissible.
>
> The police methods that were used under the law as they knew it at that time were not only proper, but in the opinion of the court, they were highly commendable; however, the law of Miranda does apply to this case.

> It is the opinion of the court that the oral statement made on Friday, that is the 18th * * * and the written statement made on Friday, the 18th, are both admissible in evidence, as being outside the scope of the effect of the Miranda decision. These statements come within the lawful and admissible scope and field of interrogation.
>
> However, as to the written statement made on Saturday, the 19th, the situation is otherwise; the court feels that the fundamental thrusts of the Miranda decision is directed toward stationhouse interrogation and that, therefore, the statement taken at the stationhouse in absence of the warnings required by the Miranda case are not, or is not admissible in evidence."

The thrust of the defense argument is that what the petitioner said to the officer and wrote out in the cruiser constituted in-custody interrogation without the constitutional warnings required by the *Miranda* decision (*Miranda v. Arizona,* 384 U. S. 436). The testimony on the motion disclosed:

Lakewood City Patrolman John L. Javor arrived at the scene to investigate a traffic accident. The petitioner, Robert Boenker, came up to him and said he was the driver of the car that was involved in the accident. The officer asked for and took his driver's license. Patrolman Javor asked Boenker to stand by until he saw that the injured persons who were still alive were taken care of. (R. 37, 57) "He told me to get out of the street so I wouldn't get hit." (R. 14) The officer went back to Boenker after the injured had been removed, asked what happened and inquired about the direction he had been traveling. Boenker orally related what happened. After hearing Boenker's answer, the officer asked him if he cared to write a statement and if he agreed, to sit in the police car and write it. (R. 38) Other witnesses were also in the police car writing out statements. (R. 51-52)

Officer Javor did not tell Boenker what to say, he was asking what happened. Boenker said he wrote "What I thought was a complete detailed description and he told me, well, to be specific on certain points." Boenker told him as best he could at that time what had happened. Robert Boenker said he was in the police car "about 20 minutes, maybe half an hour" (R. 15); after he completed the statement Robert Boenker was sent home.

The testimony at the hearing on the motion revealed that the day after the accident the police officer came to the market where Boenker was working and asked him to come to the station and clarify some matters in his statement that he wrote out soon after the accident. The petitioner said he could not leave his work but would come afterward, to which the officer assented. The officer told the petitioner's father he could come along. Later that afternoon in the presence of his father Boenker made a statement to another officer at the police station. The trial court excluded this statement because of absence of the *Miranda* warnings. However, the petitioner was not placed in custody and was sent home after this statement. He testified that the police did not tell him he was under arrest at that time and in fact he was not under arrest. He and his father left the station together (R. 20). The Papp boy died February 23rd. The petitioner was arrested March 2nd.

The defense argument seeks to bring the statement the petitioner wrote out in the police cruiser within the *Miranda* rule, as constituting the custodial interrogation defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action." There is not one scintilla of evidence in this case showing any intent to take Boenker into custody. He was merely asked to wait in the cruiser, out of the way of the traffic on the street,

for a short time until the officer had taken care of the injured, and then to write down his account of the accident. This he agreed to do and this he did. Wherein was he deprived of any freedom of action? Wherein was he under restraint? Wherein was the police car "secluded"? Proof that none of these claims has any foundation appears in the petitioner's own testimony (R. 14, 15, 16) under cross-examination:

"Q. Well, how did the police happen to come up to you?

A. They didn't. I came—I went up to the officer and I told him I was driving the car and they said, 'Well, just stay at the side a minute.'

They had to get the injured people out of there.

Q. Sir, you went up to the officer and told him that you were driving the car, and they told you to step aside for a minute, is that correct?

A. Well, he told me—he told me to get out of the street so I wouldn't get hit.

Q. And at that time, did he tell you to go sit in the police car?

A. No; not right away.

Q. Well, in a few minutes later, did he come back to you and say 'Maybe you better sit in the police car'?

A. No, sir.

Q. Well, at any time, did other people come to the police car and sit in the police car?

A. Yes, sir.

Q. And there were other people there who were driving other cars that stopped in the street that came and sat in the police car, too, is that right?

A. Yes, sir.

Q. And the officer was there asking both you and these other people what happened, isn't that right?

A. Yes, sir.

Q. And he was getting, as best he could, written observations from both yourself and some of these other parties, is that right?

A. Yes, sir.

Q. How long were you in the police car?

A. About 20 minutes, maybe half an hour.

Q. Twenty, 25 minutes, maybe a half an hour; all right. And it was this officer right here, wasn't it?

A. Yes, sir.

Q. And after you were there that period of time, you went home, on your way, didn't you?

A. Yes, sir.

* * *

Q. —Officer Javor didn't tell you what to say, did he?

A. No, sir, he didn't.

Q. He was asking you what happened, isn't that right?

Q. Yes, sir. I wrote what I thought was a complete detailed description and he told me, well, to be specific on certain points.

Q. And you told him as best you could at that time what had happened, is that right?

A. Yes, sir.

Q. And, of course, what you told him then and there was the truth as you thought at that time, is that right?

A. Yes.

Q. He didn't force you to say anything at that time, did he?

A. No, he didn't."

The defense infers that when the officer took the petitioner's driver license he was not free to depart. There is no evidence to support this conclusion. True, he could not drive his car away, but we must remember that the officer was investigating a traffic accident in which two pedestrians were seriously injured and the presence of the car was necessary to their investigation. Likewise, the officer's request that the petitioner finish the report while the facts were fresh in his mind before trying to telephone

his parents was only reasonable and certainly not evidence of any coercion.

The defense has not cited any decisions holding that evidence of on-the-scene questioning in a situation comparable is barred by the *Miranda* rule. The subject has, however, been considered by the courts. In *State v. Lief*, 234 A. 2d 124 (Conn.), a police officer sent to investigate an accident found a fence down and a car off the road. The officer asked "What happened?" and the defendant told him about a coke bottle * * *. The court held that *Miranda* would not apply to such questioning; that such a situation would be a general-on-the-scene questioning setting under *Miranda* and the prospective defendant would not be under restraint or in "custody."

In *Jones v. State*, 234 A. 2d 900 (Md.), the defendant was identified by eye-witnesses as the man who had shot another person at a dance hall altercation and the police began a search for him. They found him sitting in his car with his girl friend and a police officer asked him whether he had been at the dance hall where the shooting had occurred. This was held not to be "custody" within the meaning of *Miranda*, but rather a mere "accosting" not amounting to a significant deprivation of freedom.

In *Duffy v. State*, 243 Md. 425, 221 A. 2d 653, a policeman entered a bedroom where the defendant was sleeping, and seeing a knife the officer asked "Is this the knife you used in the fight?" The Maryland court held this was an accosting and did not amount to custodial interrogation.

Contrary to the defense claim, there is no evidence in this case which came about as the result of compelling pressures which worked to undermine Robert Boenker's will to resist and to compel him where he would otherwise not do so freely or to submit to interrogation de-

signed to elicit an incriminating statement. Rather, the conclusion is inescapable that Boenker was under no compulsion or custody whatever; that he willingly wrote out the statement after being asked if he cared to do so. As the trial court stated, the police methods used were highly commendable and the statements come within the lawful and admissible scope and field of interrogation. (R. 63.)

See *State v. Perry*, 14 Ohio St. 2d 256.

2. The petitioner complains that the State was permitted to go outside the indictment and bill of particulars to establish a violation of the Ohio assured clear distance rules. The specifications alleged in the amended bill of particulars are as follows:

> "That the defendant, on or about the 18th day of February, 1966, within Cuyahoga County, unlawfully and unintentionally killed John Perry Papp while operating a motor vehicle east on Madison Avenue at the intersection of Magee Street, at a speed greater than was reasonable or proper, and/or without due regard for the safety and rights of John Perry Papp who was lawfully crossing said roadway within a crosswalk * * *"

The portion of Revised Code 4511.21 that was specified in the indictment and upon which the charge in this case was based is:

> "No person shall operate a motor vehicle * * * upon the streets * * * at a speed greater * * * than is reasonable or proper, having due regard to the traffic, surface and width of the street * * * and any other conditions and no person shall drive any motor vehicle * * * in and upon any street * * * at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead."

The question, then, is did the indictment and amended bill of particulars serve to inform this petitioner that he

would be required to meet the assured clear distance issue portion of the statute and justify the court's charging the jury on this subject? We submit that it did. The allegation, "without due regard for the safety and rights of John Perry Papp, who was lawfully crossing said roadway within a crosswalk" taken in conjunction with the allegation of speed greater than was reasonable or proper sufficiently informed the accused that he would be required to meet the issue that he was driving so fast that he could not see what he should have seen in time to stop and thereby avoid hitting the pedestrians.

The disjunctive "or" followed by these words "without due regard for the safety and rights of John Perry Papp who was lawfully crossing said roadway within a crosswalk" served to inform the defendant that the State intended to prove that he did not have his car under control so that he could stop it within the assured clear distance ahead.

The Court of Appeals in a Memorandum to Lawyers considered the propriety of the court's charge stating:

> "While in the instant case it is apparent that the defense counsel was surprised by and unprepared for Judge Whiting's charge on the assured clear distance ahead portion of the statute (R. 455), it also is clear that such surprise is not prejudicial error.
>
> In view of the uncontested factual circumstances of this case, the first two portions of Section 4511.21, Revised Code, become so intimately interwoven that a charge of one necessarily involves a charge of the other whether specifically mentioned or not. Appellant treats assured clear distance as independent of speed; whereas it is apparent that speed is an integral factor of assured clear distance. Had the defendant been progressing at a reasonable and proper speed, he would have had time to stop before hitting John Papp. In the instant case in which the defendant hit

a stationary, discernible object, the reference, a speed greater than was reasonable, automatically infers reference to that portion of the statute pertaining to the necessity of bringing a car to a halt before hitting such an object.

Thus the reference to excessive speed in the Bill of Particulars was sufficiently generalized so as not to significantly narrow the indictment and therefore not preclude a charge on assured clear distance. No error having been shown, the case is affirmed."

The petitioner had a fair trial before a fair and impartial court and jury and nowhere were any federal constitutional standards either misapprehended or misapplied. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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